

## **SUMMARY OF PUBLIC LAW 111-240, THE SMALL BUSINESS JOBS ACT OF 2010**

On September 27, 2010, the President signed Public Law 111-240, the Small Business Jobs Act of 2010. In addition to authorizing federal financial investments and tax incentives for small businesses in an effort to increase the availability of credit for small businesses, the legislation contains a number of changes to federal procurement policy intended to promote the effective utilization of small businesses in government contracting. This summary focuses on the changes in federal procurement policy made by P.L. 111-240. As discussed further below, these changes include new limitations on contract bundling, increased oversight of prime contractor compliance with small business subcontracting plans, modification of the application of the Rule of Two to multiple award contracts (and orders placed against such contracts), annual certification of small business size status, and parity between HUBZone and other small businesses.

### **Sec. 1312. Leadership and Oversight.**

- Requires that all solicitations for multiple award contracts above an agency's "substantial bundling threshold" (currently \$6M for DOE, see FAR 7.104(d)(2)) include a provision "soliciting bids from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns."
- The Act requires that, by September 27, 2011, the FAR be amended to establish a government-wide policy on contract bundling (agencies will be required to post the policy on their websites).
- Agencies will be required to post, on agency websites, a list and rationale of any bundled contracts the agency either solicited bids for or awarded.

*DOE will update Acquisition Guide, Chapter 19, once the FAR has been amended. A provision is being drafted for solicitations and will be added to STRIPES when complete.*

### **Sec. 1313. Consolidation of Contract Requirements.**

- Prohibits agencies from bundling two or more requirements for goods or services that have previously been provided or performed under two or more separate contracts if (i) the cost of the separate contracts is lower than the cost of the bundled contract; and (ii) the total value of the bundled contract exceeds \$2M.
- Agencies may waive this prohibition if the Senior Procurement Executive or Chief Acquisition Officer: conducts market research; identifies alternative acquisition strategies that would involve a lesser degree of bundling; makes a written determination that the bundling is necessary and justified; identifies any negative impact of the bundling on small businesses; and certifies to the agency head that steps will be taken to include small business in the acquisition strategy.

*DOE will update Acquisition Guide, Chapter 19, to include this justification requirement.*

**Sec. 1321. Subcontracting Misrepresentations.**

- Requires that, by September 27, 2011, the FAR be amended to establish a policy on subcontracting compliance relating to small businesses, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices and periodic oversight and review activities.

*DOE will update Acquisition Guide, Chapter 19, once the FAR has been amended.*

**Sec. 1322. Small Business Subcontracting Improvements.**

- Requires that prime contractors make good faith efforts to utilize their proposed small business contractors during performance (in acquiring equipment, supplies, services, materials, construction work) to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. To the extent a prime contractor is unable to make a good faith effort to utilize its small business subcontractors as described above, the prime contractor must explain, in writing, to the CO the reasons why it is unable to do so.

*A provision is being drafted for solicitations and will be added to STRIPES when complete.*

**Sec. 1331. Reservation of Prime Contract Awards for Small Businesses.**

- Requires that the FAR be amended to establish guidance under which agencies “may, at their discretion” (i) set aside part or parts of a multiple award contract for small business; (ii) notwithstanding the fair opportunity requirements, set aside orders placed against multiple award contracts for small businesses; and (iii) reserve one or more contract award(s) for small businesses under full and open competition multiple award procurements.

*DOE will update Acquisition Guide, Chapter 19, once the FAR has been amended.*

#### **Sec. 1332. Micro-Purchase Guidelines.**

- Requires OMB to, by September 27, 2011, issue guidance regarding (i) the analysis of purchase card expenditures to identify opportunities for achieving and accurately measuring fair participation of small businesses in purchases not exceeding the micro-purchase threshold; and (ii) dissemination of best practices for participation of small businesses in micro-purchases.

*DOE will issue an Acquisition Letter once OMB has issued formal guidance.*

#### **Sec. 1333. Agency Accountability.**

- Requires Senior Procurement Executives, senior program managers and Directors of Small and Disadvantaged Business Utilization to “communicate to the subordinates...the importance of achieving small business goals.”

*A memorandum will be issued to communicate this message at a later date.*

#### **Sec. 1334. Payment of Subcontractors.**

- Requires that any prime contractor required by the Small Business Act develop a small business subcontracting plan to notify the agency in writing (with an explanation of its actions) if the prime contractor either (i) pays a reduced price to a subcontractor for goods and services or (ii) is more than 90 days late in paying a subcontractor.
- Additionally, the Act requires contracting officers to consider a prime contractor’s unjustified failure to make full or timely payment to small business subcontractors in evaluating the prime’s performance.
- By September 27, 2011, the FAR will be amended to (i) describe the circumstances and process by which COs are to record the identities of prime contractors who have a history of unjustified, untimely payments to subcontractors and (ii) require the inclusion of this information into the Federal Awardee Performance and Integrity Information System in such a way that the information is publicly available.

*DOE will update Acquisition Guide, Chapter 19, once the FAR has been amended.*

#### **Sec. 1335. Repeal of Small Business Competitiveness Demonstration Program.**

- Amends the Business Opportunity Development Reform Act of 1988 (Public Law 100–656) by striking title VII (15 U.S.C. 644 note).
- Takes effect on the date of enactment of the Act and applies to the first full fiscal year after the date of enactment of the Act.

*Contracting Officers should consult their local counsel in cases when their procurement actions are affected by this rule. Additional information will be included in an update of Acquisition Guide Chapter 19.*

**Sec. 1341. Policy and Presumptions.**

- Establishes a “presumption of loss to the United States based on the total amount expended” whenever it is established that a business that is not a small business willfully sought and received an award as a small business (by misrepresentation). Any of the following actions by an offeror are deemed “affirmative, willful, and intentional certifications of small business size and status”: (i) the submission of a bid or proposal for any contract, subcontract, grant, or cooperative agreement that is classified as intended for award to small business; (ii) the submission of a bid or proposal for any contract, subcontract, grant, or cooperative agreement that encourages an agency to classify the bid or proposal, if awarded, as a proposal from a small business; and (iii) registration on any federal electronic database for the purpose of being considered for award of a contract, subcontract, grant, or cooperative agreement as a small business.
- Requires all solicitations to contain a certification concerning the small business size status of the business, which must be signed by an authorized official of the small business.

*Additional guidance on the form and content of the certification is forthcoming.*

**Sec. 1342. Annual Certification.**

- Requires each small business to certify, on an annual basis, its small business size and, if appropriate, its small business size status, through the Online Representations and Certifications Application database.
- By September 27, 2011, requires SBA to issue regulations to ensure that no business continues to be certified as a small business that fails to annually re-certify its size status.

**Sec. 1343. Training for Contracting and Enforcement Personnel.**

- By September 27, 2011, the Federal Acquisition Institute is required to develop courses for acquisition personnel concerning proper classification of business concerns and small business size and status.

**Sec. 1344. Updated Size Standards.**

- Requires SBA to review one third of the small business size standards every 18 months, on a rotating basis.

**Sec. 1347. Small Business Contracting Parity.**

- Replaces the “shall” with a “may” in the section of the Small Business Act dealing with the set-aside of contract opportunities for HUBZone small businesses when the agency expects it will receive two or more offers from HUBZone businesses , thereby re-establishing equivalence between HUBZone small businesses and other small businesses.
- Amends the calculation of the government-wide procurement goal of 3% participation by HUBZone small businesses to cover subcontracts (the previous goal of “3 percent of the total value of all prime contracts” now reads “3 percent of the total value of all prime contracts and subcontracts”).

*Contracting Officers should consult their local counsel in cases when their procurement actions are affected by this rule. Additional information will be included in an update of Acquisition Guide Chapter 19.*